Supreme Court, U.S.
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No. 97-2080

In The

Supreme Court of the United States

October Term, 1997

J & E SALVAGE COMPANY, JOHN DARLINGTON and THERESA N. DARLINGTON, Executrix of the Estate of EDWARD DARLINGTON,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONERS

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FURTHER REASONS FOR GRANTING THE WRIT

I

One of the major fallacies in the government's position in this case is revealed in its formulation of the "Question Presented", which states as follows:

> Whether the government's refusal to return helicopter transmissions that were inside containers that petitioners purchased at auction as surplus property constitutes a taking under the Just Compensation Clause of the Fifth Amendment, where the transmissions came into the government's possession pursuant to court order.

The "court order" by which the government came into possession was a "court order" entered by a "court" which had no subject matter jurisdiction. *United States v. J&E Salvage Co.*, F.3d 985, 990 (4th Cir. 1995) (Pet. App. E). This Court has never hesitated to hold that orders entered by courts lacking jurisdiction are not merely voidable but in fact are void even prior to their reversal. *Vallely v. Northern Fire & Marine Ins. Co.*, 254 U.S. 348 (1920). Indeed in *Burnham v. Superior Court of California*, 495 U.S. 604 (1990), Justice Scalia recounted the history of the proposition.

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, see *Bowser v. Collins*, Y.B.Mich. 22 Edw. 4, f. 30, pl. 11, 145 Eng. Rep. 97 (1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Co.Rep. 68b, 77 Eng. Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase coram non judice, "before a person not a judge"- meaning, in effect, that the proceeding in question was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted.

495 U.S. at 608-9.

Thus, when petitioners were forced by threat of imprisonment to relinquish possession of the transmissions, under the doctrine "corum non judice" they were not complying with a lawful order of a constitutionally authorized court, but rather were simply acquiescing to the demands of a person who, without legal authority, nevertheless had the power to bring down the wrath of the federal government upon them if the petitioners did not do what he told them to do. The United States of America can claim no immunity by virtue of his order and it ill-behooves it to attempt to do so.

II

The government attempts to take the "breach of contract versus the just compensation" issue argument in this case and stand it on its head. Had the government acted properly at the beginning of this case, the government would have filed a claim under the Contract Disputes Act as mandated by that act. However, rather than doing so, it filed suit in the Eastern District of North Carolina, which it knew or should have known lacked subject matter jurisdiction. The District Court, which lacked subject matter jurisdiction, ordered petitioners, on pain of imprisonment, to surrender the transmissions. The government took the transmissions and refused to return them when it was formally adjudged that the order under which it had gained the transmissions was void. Thus, the manner in which it gained the transmissions was no more legal than if it had simply sent a battalion of Marines to petitioners' business and demanded the transmissions at gunpoint.

Now, in what can only be described as the height of hypocrisy, the government criticizes petitioners for not properly seeking a so-called remedy under the Contract Disputes Act. However, by the time the government refused to return the transmissions, the question was no longer one arising under the Contract Disputes Act. Rather, it was a question of a taking, essentially a theft, and the issue that remained was whether petitioners were to be compensated as the Fifth Amendment promises.

The government's attempt, therefore, to distinguish *United States v. Jones*, 176 F.2d 278 (1949), is vacuous. In *Jones*, the property in

question remained with the purchaser. The government did not remove it from the purchaser's possession by a show of force as it did here. Thus, there was no taking.

Similarly, the government's attempt to distinguish § 25 of the War Surplus Property Act of 1944 from 40 U.S.C. § 484(d) is futile on both legal and factual grounds. As petitioners showed in the original Petition for Writ of Certiorari, the court in *Pacific Harbor Capital, Inc. v. Department of Agriculture*, 845 F. Supp. 1 (D.D.C. 1993) held that "the addition of the word surplus to the language of the statute was without effect." Moreover, as a factual matter, the government has never made any showing that the transmissions in question were not surplus as a matter of fact, notwithstanding the government's lukewarm protestations to the contrary.[1]

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1. At footnote 5 on page 9 of the Brief in Opposition the government alleges that "The declarations of two contracting officials (*see* C.A. App. A177, A200-A201), however, supported the Court of Federal Claims' factual determination" . . . with regard to whether or not the transmissions had been left in the containers inadvertently. Actually, one of the declarations, that of John C. McMahon, simply says that to the best of his knowledge and belief no DRMO employee knew that the containers had anything in them and that DRMO had no intention or authority to sell any transmissions at the auction in question. The declaration of McMahon "begs the question" as to knowledge and intent in view of the regulations contained in Appendix H which require that all containers be inspected for contents prior to being offered for sale.

Similarly, the declaration of Frank Zito at page 200 and 201 of the Court of Appeals appendix says that to his knowledge and belief "no one at the DRMO knew that any of the containers had anything inside them and that DRMO had no intention to sell or authority to sell the transmissions." However, for purposes of petitioners' title to the transmissions, 40 U.S.C. § 484(d) ensures the petitioners that the regulations were followed and the containers were thoroughly inspected before they were put up for sale. As petitioners have continuously argued throughout this litigation, and the lower courts have almost universally held in prior cases, if the government is allowed to claim that the sale of surplus property was made without authority or by mistake, then title to the property purchased will never be secure. Thus, the marketability of surplus property will be drastically impaired.

III

The government's argument that "conflicts with district court and administrative decisions are better policed, in the first instance, by the court of appeals" is empty because in all instances, *e.g. Pacific Harbor Corp., supra, East Tennessee Iron & Metal Co. v. United States*, 218 F. Supp. 377 (1963); *Turney v. United States*, 115 F. Supp. 457 (Ct. Cl. 1953), and *Appeal of Gonsalves*, A.S.B.C.A. No. 31874 (Mar. 10, 1986),[2] the United States lost in the courts cited and did not appeal the decisions. Indeed, the United States acquiesced in the holdings cited which were favorable to petitioners, and then in the present case has attempted, and thus far succeeded, in making an end-run around the established law.

IV

Indeed, the depths to which the United States is willing to sink in its attempts to cheat the petitioners in this case is shown by its reliance on the "Limited Settlement Agreement" in this case. (Opp. Brief p.3). This document, which was never filed in any court and which the respective attorneys in the United States District Court in the Eastern District of North Carolina agreed would never be made public unless the government won in the Fourth Circuit Court of Appeals, reflected petitioners' willingness to avoid having the government go to unreasonable trouble and expense in carrying out the order of surrender of the transmissions which had been entered by the Judge in the District Court. Transferring the heavy and unwieldy transmissions from the containers, which were indisputably the property of the petitioners, into new containers would have been a daunting task, requiring considerable equipment and manpower. In order to accommodate the government, petitioners simply agreed to trade containers, and the government agreed that, in the event petitioners won on appeal, it would trade the containers back. The settlement agreement became moot when the Fourth Circuit held that what had transpired in the Eastern District of North Carolina was moot, since the order which the District Court had entered was void.

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2. As petitioners pointed out at page 6 of the original Petition for Writ of Certiorari filed in this case, the facts in the *Gonsalves* case were virtually identical with the facts in this case. Why the government chose not to appeal *Gonsalves* if it believed that holding to be wrong is a mystery to petitioners.

V

The government, following the line of the Federal Circuit in the opinion below, relies heavily on the "scope of the original sales contract" and says that the transmissions were not within the "scope of the contract." However, the question presented here does not deal directly with what the scope of the contract was. Rather, it deals with what the "*scope of the bill of sale*" was. In surplus sales, the description of the property contracted for means very little because the government does not warrant the description of the property. All property is sold "as is/where is." *See*, "Sale of Government Property, General Sales Terms and Conditions" No. 2, Appendix G.

As petitioners have pointed out throughout this litigation, there is no language in 40 U.S.C. § 484 that requires that the property protected by that section be particularly described by the bill of sale or other instrument purporting to transfer title. If the containers in question here had been full of dirt, then petitioners would not have been able to make a claim against the government for the excess cost of transporting the containers. Had the transmissions in fact been worthless as the government thought they were at the time that it decided to sell them, the petitioners would have been forced to dispose of the transmissions at petitioners' expense.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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